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April 24, 2002

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554

Re: MM Docket No. 90-66
Petition for Reconsideration
Twenty-One Sound Communications, Inc.

Dear Mr. Caton:

Transmitted herewith, on behalf of Twenty-One Sound Communications, Inc., licensee of Station KNSX(FM), Steelville, Missouri, is an original and fourteen (14) copies of its Petition for Reconsideration in the above-referenced proceeding.

Please contact the undersigned should the Commission have any questions regarding this filing.

Sincerely,

Lee J. Peltzman
Counsel for
TWENTY-ONE SOUND
COMMUNICATIONS, INC.

Enclosure

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In re Matter of:	)	
	)	MM DOCKET NO. 90-66
Amendment of Section 73.202(b)	)	
Table of Allotments	)	RM-7139
FM Broadcast Stations	)	RM-7368
(Lincoln, Osage Beach,	)	RM-7369
Steelville, and Warsaw, Missouri	)	

PETITION FOR RECONSIDERATION

Twenty-One Sound Communications, Inc. ("Twenty-One"), by its attorney, hereby seeks reconsideration of the Commission Memorandum Opinion and Order, FCC 02-35, released March 25, 2002 ("March 25 MO&O"), *erratum* released March 29, 2002, in the above-captioned proceeding. In support of its position, Twenty-One states the following:

The basic issue in this case is not whether the Commission may adopt a new procedural standard for pleadings filed in rulemakings in the future; rather, the issue is, as it has always been, whether the Commission can treat two similarly situated parties differently without just cause. Clearly, the Commission may not, and, as such, the March 25, 2002 MO&O is arbitrary and capricious and should be reconsidered.

This case commenced over a decade ago with the filing of a rulemaking petition by KRMS-KYLC, Inc. ("KYLC"), licensee of Station KYLC(FM), Osage Beach, Missouri, which proposed the substitution of Channel 228C3 for 228A at Osage Beach, and the modification of Station KYLC's license to specify operation on Channel 228C3. In response to a Commission Notice of Proposed Rule Making, 5 FCC 1119 (1990), Twenty-One counterproposed the

substitution of Channel 227C1 for Channel 227C2 at Steelville and the modification of its Station KNSX(FM), Steelville, Missouri.

In a Report and Order, 7 FCC Rcd 3015 (1992), the Commission dismissed Twenty-One's Counterproposal and granted the KYLC Proposal. The Commission found that Twenty-One had violated Section 1.52 of its rules by failing to include an affidavit in its Counterproposal verifying that the statements contained therein were accurate to the best of its knowledge. The Commission concluded that, in the absence of such a verification, the Counterproposal should be dismissed. 7 FCC Rcd 3015 at n. 2. In rendering its decision, the Commission cited to its rulemaking in Abuses of Broadcast Licensing and Allotment Processes, 5 FCC Rcd 3910, 3919 n. 41 (1990) ("Abuse of Process").

Twenty-One has repeatedly sought reconsideration and review of this decision at all levels of the Commission. It has pointed out that its proposal was substantively superior to the KYLC proposal under the Commission's own rulemaking criteria and that the Commission's prior reliance on Section 1.52 of its rules was discretionary rather than mandatory. Thus far, Twenty-One's urgings that the Commission reach the merits of its proposal, rather than just simply take the easy out and dismiss it on procedural grounds, have fallen on deaf ears.

Most recently, in its March 25, 2002 MO&O, the Commission has for the first time acknowledged that it has not always enforced Section 1.52 as a non-discretionary rule leading to automatic dismissal. Instead, the Commission has attempted to distinguish its treatment of similarly situated cases by adopting post-hoc rationalizations for its actions. These rationales simply do not hold water under any reasoned review.

Under the law, the Commission must treat similarly situated parties equally or clearly explain the reasons for the differing treatment. The Commission is under a continuing obligation

to "explain its reasons and do more than enumerate factual differences, if any, between [the parties]; it must explain the relevance of those differences to the purposes of the Communications Act."[1] The Commission must address "the rationale underlying the importance of factual distinctions as well as the factual distinctions themselves."[2]

The Commission is not at liberty to depart from clear precedent whenever it likes. See Orion Communications Ltd. v. FCC, 131 F.3d 176 (D.C. Cir. 1997); Consolidated Nine, Inc. v. FCC, 403 F.2d 585 (D.C. Cir. 1968). Moreover, while the Commission may always provide an explanation as to why it intends to depart from clear precedent to resolve future applications, where it is dealing with a confined class, such as those parties who failed to provide a verified statement pursuant to Section 1.52 of the Commission's rules prior to October 4, 1990 (the effective date of its Abuse of Process proceeding), fundamental fairness dictates that the Commission act in a consistent manner.

The Commission, in Brooksville or Quitman, Mississippi, 8 FCC Rcd 3537 (1993), made it clear that it recognized that the petitioners had failed to comply with Section 1.52 in filing their petitions and that the Commission had placed all parties on notice via its Abuse of Process decision that, henceforth verification requirements under Section 1.52 of the rules would be strictly enforced in allotment proceedings. However, it further noted that the effective date of the Abuse of Process decision was October 4, 1990, subsequent to the mistaken filings. The Commission therefore concluded that "because the petitions filed by Pearce and Quitman were filed prior to the effective date of that proceeding, we shall accept the petitions." 8 FCC Rcd at 3537 n.1. There was no discussion in the Commission decision regarding fairness or unfairness

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[1] Public Media Center, v. FCC, 587 F. 2d 1322, 1331 (D.C. Cir. 1978), quoting Melody Music, Inc. v. FCC, 345 F.2d 730, 733 (D.C. Cir. 1965).
[2] Public Media Center, 557 F.2d at 1332.

to any other party, nor was any other reason given for its decision. One can reasonably presume, utilizing common sense, that the basis of the Commission decision was what the Commission actually stated as the basis for its conclusion. Even the Commission in its March 25, 2002 MO&O agrees with Twenty-One that the Brookville and Quitman petitions were considered despite the fact that they were not verified and that the stated FCC rationale for that approach was the lack of notice to the petitioners. The Commission, however, felt itself unconstrained to provide an additional post-hoc rationalization for the Brooksville or Quitman decision so as to better support its present decision. Under the Commission's theory, the resolution of the earlier case was consistent with other cases where verification was overlooked because of a lack of prejudice and, therefore, the Commission presently reasons, that must have been the unstated, undeclared real basis of the Brooksville or Quitman case.

This reasoning turns logic on its head. The Commission gave a reason to support its decision in Brooksville or Quitman and it matches the facts at hand. This, however, is irrelevant to the Commission because an unstated reason in that 1993 case supports the Commission position taken in the present case. Substantive due process does not rest on such mumble-jumble thinking. Rather, due process should be made of sterner stuff.

Similarly, the Commission now acknowledges that in Scottsboro, Alabama, 4 FCC Rcd 6473 (1989), the Commission compared two mutually exclusive FM allotment proposals on the merits and granted the one with a verification defect, subsequently excusing the defect when brought up on reconsideration. 6 FCC Rcd 6111, 6112 (1991). The Commission attempts presently to excuse this decision by pointing out, as neither FCC decision did, that the reason for excusing the verification defect was because the proposal would have provided a first local service. It also adds that the rulemaking petitioner that failed to verify his proposal was not

among the applicants for the allotment, and, therefore, was not involved further in the proceeding. This point would seem to be a non-starter, since the petitioner's comments were crucial in the Commission decision allotting the new channel. The fact that it had not applied subsequently was completely irrelevant, since the Commission makes rulemaking decisions not in the private interest of any party but, rather, in the public interest. The Commission then goes on in its March 25 MO&O to claim that, to the extent those reasons don't wash and the reader views the decision as being at odds with other cases where the verification rule was applied strictly, it should not be followed. Once again, the Commission attempts to obfuscate and, when it is unsuccessful in doing so, simply walks away from its prior decisions. There is no basis for according unfair dissimilar treatment to Twenty-One than the parties in these earlier decisions.

Similarly, in Canton, Illinois 3 FCC Rcd 5824 (1988), the Commission accepted an unverified counterproposal once again. The Commission attempts to distinguish this case by arguing that, even though the Commission did not discuss it in 1988, it now appears in 2002 that there was no prejudice caused by acceptance of the unverified proposal. Yet, the Commission in Canton examined whether there were public interest reasons which would have provided a reason to accept the unverified counterproposal. That is all that Twenty-One has asked the Commission to do throughout this proceeding. Yet, the Commission has refused to weigh the public interest reasons behind acceptance of the Twenty-One counterproposal.

In Lake City, South Carolina 47 FCC 2d 1067 (1974), the Commission once again accepted an unverified counterproposal. The Commission presently attempts to distinguish this case because the unverified proposal eventually lost on a comparative basis. Yet, the important point is that the Commission considered the procedural question before reaching the substantive decision and accepted the counterproposal. Any attempt to distinguish the Lake City case

because the counterproponent eventually lost on substantive grounds is sheer folly. The Commission has refused to consider whether Twenty-One should win or lose on substantive grounds. This equitable treatment should cease since it is arbitrary.

In fact, the purpose of the Abuse of Process proceeding was not to penalize parties such as Twenty-One, but rather to ensure that parties did not engage in an abuse of the Commission's processes by seeking to be paid improperly for the withdrawal of expressions of interest in allotment proceedings. No such accusation has ever been made in this case, and, in fact, none could be, give the history of this proceeding. Therefore, the Commission's reasons for strictly enforcing Section 1.52 are not applicable in this case and should not be applied as a penalty to Twenty-One.

Further, it should be noted that the Commission has refused to strictly enforce Section 1.52 of its rules in other venues. See WTWV, Inc. 33 RR 2d 65, 67 n. 4 (1975); United Broadcasting Co., 36 RR 2d 1556, 1560 n. 1 (Rev. Bd. 1976) (opposition considered despite its violation of Section 1.52). Similar treatment should be provided Twenty-One here.

In view of the above, Twenty-One appeals to the Commission to reconsider its flawed decision and consider the Twenty-One counterproposal under the public interest.

Respectfully submitted,

TWENTY-ONE SOUND
COMMUNICATIONS, INC.

By: _____
Lee J. Peltzman
Its Attorney

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April 24, 2002

CERTIFICATE OF SERVICE

I, Susan Crawford, a secretary in the law firm of Shainis & Peltzman, de hereby certify that a copy of the foregoing PETITION FOR RECONSIDERATION was sent, via First Class Mail, this 24th day of April, 2002, to the following:

Gregg P. Skall, Esq.
Womble, Carlyle, Sandridge & Rice
1401 Eye Street, NW, 7th Floor
Washington, D.C. 20005

Susan Crawford